UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

MANOR CARE OF EASTON, PA, LLC, D/B/A MANORCARE HEALTH SERVICES – EASTON,	)	
Respondent,	)	Cases 4-CA-36064
and	)	4-CA-36190
SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE PA,	)	
Charging Party.	)	

RESPONDENT'S BRIEF IN REPLY TO THE ANSWERING BRIEFS FILED BY THE GENERAL COUNSEL AND CHARGING PARTY

NOW COMES Manor Care of Easton, PA, LLC, d/b/a Manorcare Health Services – Easton, Respondent herein, and files this Reply Brief to the Answering Briefs filed by the General Counsel and the Charging Party, as follows:

INTRODUCTION

Respondent has filed detailed exceptions and a comprehensive supporting brief, and most of the arguments made by the General Counsel and the Charging Party are adequately addressed therein. However, the following contentions warrant a brief reply:

1. General Counsel's contention that Respondent is attempting to make this a "test case" and that the Board should avoid addressing Respondent's contention that employees do not have a § 7 right to solicit patients of a health care institution. (GC Ans. Brf. 1; 53-54).[1]

[1] References to the General Counsel's Answering Brief will be notated as "GC Ans. Brf. [page]." References to the Answering Brief of the Charging Party will be notated as "CP Ans. Brf. [page]."

2. General Counsel's contention that Respondent's position regarding union solicitation of residents "endangers the civic rights of elderly citizens." (GC Ans. Brf. 54-55).

3. Charging Party's contention that Miechur did not engage in solicitation of residents and that the *Burnup & Sims* doctrine is applicable. (CP Ans. Brf. 23-24; 25-27).

4. Charging Party's contention that Miechur's alleged self-disclosure was made to a "union friendly management official" cannot be viewed as evidence of her open support of the Union pursuant to *Rossmore House.* (CP Ans. Brf. 56).

ARGUMENT

A. The Board Must Address Respondent's Contention That Solicitation Of Patients Of A Health Care Institution Is Unprotected.

The General Counsel suggests that Respondent is attempting to turn this case into a "test case" concerning whether employees have a right to solicit patients of a health care institution to support them in their labor dispute with their employer and that the Board should reject this invitation. This contention lacks merit.

First, the General Counsel's implication that there is something unseemly about raising arguments that may not be fully developed by existing case law is unfounded. That is what the Board's primary role is in establishing federal labor policy. And this issue is a highly important one to all health care employers, employees, and unions. The unsettled answer is no reason to dodge the question.

Second, this is a "real" dispute with "real" facts. It is not an attempt to seek an advisory opinion on a hypothetical set of facts. Thus, an actual controversy exists that is ripe for consideration and resolution by the Board.

Third, this issue is "necessary" to a proper resolution of the lawfulness of Miechur's discipline. The ALJ's *Wright Line* analysis simply cannot be defended if, as Respondent contends, Miechur's conduct was unprotected and "cause" for discipline under § 10(c) of the Act. This analysis is far too infected by the ALJ's clear disdain for Respondent's position that solicitation of residents constituted unprotected misconduct.

Of course, the Board could, if it so chose, fully accept, without deciding, that Miechur's activities constituted unprotected misconduct and cause for discipline, but in doing so it would have to accept the full implications of that assumption. It could not, as the ALJ did, merely accept that Respondent "contended" that the solicitation of residents was lawful grounds for discipline, while making it clear at every turn of his *Wright Line* analysis that the conduct was not in fact grounds for discipline. And in conducting its *Wright Line* analysis the Board would be required to explain convincingly why Respondent rejected the more immediate "good cause" in favor of the more remote "union activity." Respondent contends that the record does not contain substantial evidence that would support any such attempted explanation. Inasmuch as Respondent intends to seek review from an appropriate court of appeals if the ALJ's findings and conclusions regarding Miechur are adopted by the Board, considerations of judicial economy counsel in favor of the Board directly addressing the § 7 issue at this time.

B. Restrictions On Solicitation Of Patients Of A Health Care Institution Will Not Endanger The Health And Welfare Of Patients.

In what can only be characterized as an overwrought case of hysteria, the General Counsel suggests that Respondent's legal position "endangers the civic rights of elderly citizens." (GC Ans. Brf. 54). Nothing could be further from the truth. All that Respondent's position does is exempt *employee efforts to embroil patients of a health care institution in a labor dispute between employees and their employer from the protections of § 7.* The patients

retain all of their civic and legal rights. They are free to file complaints with the employer, the state, or the federal government. Further, if they choose on their own to support employees in a labor dispute, they may do so. The restrictions that Respondent suggests run only to employees. And those restrictions are limited only to making section 7 inapplicable to direct attempts to involve patients in a labor dispute. Employees would retain all other state and federal rights. They could, as they did here, petition state representatives, and they remain fully free to bring patient care concerns to appropriate governmental agencies. General Counsel's fears are unfounded.

C. The Burnup & Sims Theory Has Not Been Preserved

The ALJ declined to address the *Burnup & Sims* theory that Miechur was not guilty of the alleged misconduct and thus could not be disciplined even if Respondent in good faith believed that she had committed the offense. Further, his entire analysis is premised on the implied finding of fact that Miechur did solicit residents to sign the Mundy letter. Neither the General Counsel nor the Charging Party filed any exceptions or cross-exceptions to the ALJ's decision. Nevertheless, the Charging Party attempts to reassert this theory in its answering brief. It is well settled, however, that "[t]he Board's Rules and Regulations do not permit a party to assert cross-exceptions in an answering brief" and that a contention raised solely in an answering brief is waived. *The Bohemian Club,* 351 NLRB No. 59, n. 6 (2007). The *Burnup & Sims* theory has not been preserved.

D. Miechur's Disclosure Of Her Union Activity To A Member Of Management Established Her Open Support For The Organizing Efforts

Charging Party argues in its Answer that Miechur's Union activities were not conducted "openly," despite the fact that she explicitly informed HR Director Reitnauer of the efforts she was personally undertaking on behalf of the Union. Based on this misconception, Charging

Party distinguishes Miechur's conduct from that open conduct which established the "totality of circumstances" rule in *Rossmore House,* 269 NLRB 1176 (1984). This argument, however, is specious, and relies on facts not in evidence. Specifically, by portraying Reitnauer as a "union friendly management official," Charging Party has baldly ignored Reitnauer's testimony to the contrary; no evidence is offered in support of this contention. (CP Ans. Brf. 56). Additionally, the Charging Party's position ignores the context in which the alleged interrogations occurred, as well as the continuing alleged conversations between Miechur and other management officials, and misses the very point of *Rossmore House* – that "the First Amendment permits employers to communicate with their employees concerning an ongoing union organizing campaign so long as the communications do not contain a threat of reprisal or force or promise of benefit," and that "what the Act proscribes is **only those instances of true interrogation** which tend to interfere with the employees' right to organize." *Id.* at 1177. Finally, *Rossmore House* further establishes that mere questioning of open union supporters does not constitute unlawful interrogation under Section 8(a)(1) of the Act. *See also J. Coty Messenger Service, Inc.,* 272 NLRB 268, n. 7. And, despite the Charging Party's efforts to diminish the import of Miechur's spontaneous admission, the record establishes that she did, in fact, reveal her activity to Reitnauer, and then – if Miechur's own testimony is credited – to Heimbach, as well. As such, it is apparent that the various instances of "interrogation" must be considered in the context of Miechur being an open supporter, and not an individual seeking to hide her covert activity.

CONCLUSION

For the above reasons, Respondent requests that the Complaint be dismissed in its entirety.

Respectfully submitted this 16th day of April, 2009.

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CERTIFICATE OF SERVICE

I, Leigh Elise Tyson, do hereby certify that the foregoing Brief in Support of Exceptions has this day been served by electronic filing to the Executive Secretary, National Labor Relations Board, and that the following persons have been served via electronic copy:

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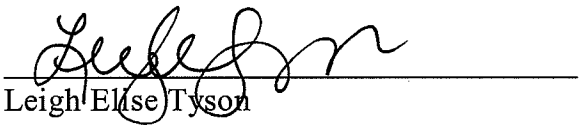
Dated this 15th day of April, 2009.



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